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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

DATE: **JUN 17 2011** OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal from that decision. The petitioner filed a motion to reopen and reconsider the AAO's decision. The AAO dismissed that motion as untimely. The matter is now before the AAO on a second motion to reopen and reconsider. The AAO will grant the motion and affirm the dismissal of the prior motion.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a "Legal Expert – International Law of the Sea and International Relations." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO dismissed the petitioner's appeal. The petitioner contested that dismissal in a motion to reopen and reconsider, which the AAO dismissed as untimely. The petitioner's present motion contests that finding and again argues the merits of the petition.

The motion seeks to address two separate issues. The first issue concerns the timeliness of the previous motion. The second issue concerns the merits of that earlier motion. If the earlier motion was timely filed, then the AAO should have considered the merits. If, however, the AAO was correct in finding that the earlier motion was untimely, then the AAO was also correct in refusing to engage in further discussion of the merits. Therefore, the AAO need take up the second issue (merits) only if it finds in the petitioner's favor regarding the first issue (timely filing).

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i). The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.2(a)(7)(i) fixes the receipt date as the date of actual receipt at a USCIS Service Center, not the date of mailing. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner filed the Form I-140 petition on June 4, 2007. The director denied the petition on July 28, 2008. The petitioner filed a timely appeal to that decision on September 2, 2008. (The 33rd day after the denial date was August 30, but that day and August 31 were on a weekend, and Monday, September 1, was Labor Day, a federal holiday. Therefore, Tuesday, September 2, 2008, was the first day after the filing deadline in which the federal government was open for business.) See 8 C.F.R. § 1.1(h).

The AAO dismissed the appeal in a decision date-stamped May 4, 2009, a Monday. Once again, the 33rd day after that decision (June 6, 2009) fell on a Saturday. Therefore, the deadline to file a timely motion was Monday, June 8, 2009.

The petitioner filed a motion to reopen the AAO's May 2009 decision. The petitioner submitted the motion via FedEx. The Nebraska Service Center stamped the motion as received on Tuesday, June 9, 2009, 36 days after the date stamped on the AAO's dismissal notice. On February 23, 2010, the AAO dismissed the petitioner's motion as untimely.

In the latest motion, timely filed on March 26, 2010, the petitioner stated that the AAO should have begun counting days on May 5, 2009, the day after the decision date, rather than on the May 4 issuance date. The AAO, however, did just that. Beginning with Tuesday, May 5, 2009 as day 1, day 33 calculates to Saturday, June 6; the first business day after that date was Monday, June 8. If the AAO had counted Monday, May 4, as day 1, then day 33 would have been Friday, June 5.

The petitioner claims that the delay was beyond his control (a circumstance that would permit untimely filing of a motion to reopen, but not a motion to reconsider):

I hand[ed] over the package of documents containing my Motion in the evening of June 05, 2009 at FedEx Facility in the Government Center, Boston, MA expecting an overnight delivery of the package. (Please refer to the attached original receipt from the FedEx.) Since FedEx electronic filing system was down and not functioning properly at the moment, the FedEx team member . . . asked me to leave the package promising that it would be promptly processed once the system [was] reinstated. Subsequent to the decision of the AAO, When I brought this to their attention FedEx promptly paid my money back and agreed to compensate and provide a letter explaining how the delay had occurred after an internal inquiry. However I am yet to receive that explanation from FedEx.

The petitioner submits a handwritten, original FedEx mailing receipt, tracking number 8640 6613 5471. The petitioner wrote his name and address, as well as the address of the Nebraska Service Center, in black ink (which appears brown when viewed through the back of the document). Above this information, the petitioner wrote the date "06/05/09" in dark blue ink (which appears blue when viewed through the back of the document).

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)). The petitioner submitted no supporting documentation, such as an explanation from FedEx, to establish that he actually gave the package to FedEx on June 5, 2009.

When the Nebraska Service Center received the motion on June 9, 2009, it included the carbonless copy of the FedEx receipt in the record. That copy shows the same tracking number as the original receipt

that the petitioner submits on appeal. The handwritten names and addresses are identical on both copies. The carbonless copy, however, bears the handwritten date "6/7/09." Because the handwritten dates on the two FedEx receipts do not match, the record does not reveal exactly when the petitioner wrote "06/05/09" on his receipt. Because that same date is not visible on the otherwise clearly legible carbonless copy, it appears that the petitioner added the date after the copies had been separated. This is consistent with the visibly different ink color of the date compared to the rest of the handwritten data on the receipt.

The AAO need not speculate as to how two different dates ended up on otherwise identical copies of the same receipt. It will suffice to say that, because of this discrepancy, and because the petitioner has produced nothing from FedEx to corroborate his version of events, there is no evidence that the petitioner actually gave the package to FedEx on June 5 as claimed.

The petitioner devotes the rest of his latest motion to the merits of the underlying petition. The AAO will not consider these arguments, however, because the petitioner has not shown that the AAO erred in dismissing the previous motion.

ORDER: The Administrative Appeals Office's decision of February 23, 2010, is affirmed. The denial of the petition and the dismissal of the appeal are undisturbed.